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NO. 90-546

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1990

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SUSAN and REGGIE GRIFFITH, ET AL., Petitioners
V.
MARLIN W. JOHNSTON, Commissioner of the
Texas Department of Human Services, Respondent

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Do adoptive children who claim interests in the "uninhibited development of their personalities," "in living in non-restrictive circumstances" and in "minimally adequate care and treatment" and their adoptive parents who claim interests in "informed decision making in the adoption process" assert interests in liberty or property which are fundamental in the constitutional sense so as to invoke the protection of the Fourteenth Amendment to the Constitution?

2. Is there an ongoing "special relationship" between a state official and a child who was once in the conservatorship of that official but who is now in a permanent adoptive home so as to create an affirmative constitutional duty by that official to provide post adoptive services to that child and his adoptive parents?

3. Does this Court's decision in *Torres v. Oakland Scavenger Co.*, construing Rule 3(c) of the Federal Rules of Appellant Procedure, mean that a Notice of Appeal is deficient if it states that "Plaintiffs" take the appeal and if counsel who represents all the Plaintiffs signs the Notice and, in addition, files a Notice of Appearance listing the Plaintiffs by name?

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STATEMENT OF THE CASE

Petitioners' Statement of the Case contains many conclusory statements of fact and characterizations of counsel which in Respondent's view distort the factual basis of this case. Respondent is fully aware of the rule which requires the appellate court to accept as true all of the Plaintiffs' well pleaded facts and to view them in the light most favorable to the Plaintiffs when as here, the court is reviewing a Rule 12(b)(6) dismissal. *Carpenters Local v. Pratt-Farnsworth*, 690 F.2d. 489, 500 (5th Cir. 1982) *cert. denied*. 464 U.S. 923, 104 S.Ct. 335, 78 L. Ed. 2d 305 (1983). Nor can the appellate court affirm such a dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 412, 45-46 78 S.Ct. 99, 102, 2 L. Ed. 2d 80 (1957). The application of this standard should be undertaken with great care in light of the vague and conclusory allegations in petitioners' complaint and as presented before this court in their statement of the case. Petitioners' description of the program administered by the Commissioner is particularly suspect when compared to the extensive statutory language, agency rules and management policy which thoroughly describe the Commissioner's program.[1]

The Texas adoption program was described in some detail by the court below and will therefore not be described again except to challenge perceived misstatements about that program made by the petitioners. Petition for Writ of Certiorari, pp. 9a-14a.

The Commissioner of the Texas Department of Human Services administers a program which seeks to

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[1] The Court below recognized the complications presented by plaintiffs' generalized pleadings and observed inter alia "Since plaintiffs' complaint frequently relies on vague generalities and legal conclusions to plead this cause of action, appellants' complaint borders on legal insufficiency." Petition for Writ of Certiorari, pp. 15a-16a.

place children with special needs for adoption. Between 1976 and 1982, the Petitioners (Griffiths) adopted five children from the Department. Prior to their adoption the children had been in the managing conservatorship of the Department. Petitioners assert that the program induces prospective adoptive parents to take these special needs children out of the State's custody so that the State can save money. This is allegedly accomplished by purposefully or recklessly withholding records and other information about the children despite written policy statements, agency rule and statutory language to the contrary. Petition for Writ of Certiorari, pp. 11a-12a. Any reasonable reading of this State policy dictates the conclusion that the Commissioner's policy was to disclose information and records.[2]

Petitioners further allege that the Commissioner failed to employ experts in the persons of psychologists and others to permit the Commissioner to discover and pass along to prospective adoptive parents information about the problems peculiar to children with special needs in order that parents could make "informed decisions" and be prepared to provide "minimally adequate" care and treatment for such children. Complaint, paras. 25-28; Petition for Writ of Certiorari, pp. 59a-60a.

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[2] That the State places children for adoption primarily to save money is likewise not supported by State or Federal law or by written State policy. The specifically stated legislative intent of the State's program to promote the adoption of hard to place children is "that the program benefit hard-to-place children residing in foster homes, at state or county expense by providing them with the stability and security of permanent homes and that the cost paid by state and counties for foster home care for the children be reduced" V.T.C.A., Human Resources Code § 47.001. Federal law has a similar expression of legislative intent regarding its adoptive assistance program. 42 U.S.C. § 673 et seq. One such purpose is described as . . ." present law is modified to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children. . . .U.S. Code Congressional and Administrative News - 96th Congress Second Session 1980 - Vol. 3 p. 1450-1451.

Subsequent to the consummation of petitioners' adoptions, in most instances many years later, petitioners assert that some of the children began to exhibit medical, emotional and psychological disorders resulting in disruptive behavior at home requiring, in some cases, institutionalization and other treatment involving significant expense to the family. Complaint paras. 22-23; Petition for Writ of Certiorari, pp. 58a-59a. These events occurred, petitioners allege, as a result of the Commissioner's failure to adequately train agency caseworkers, as well as the petitioners themselves, in how to care for their adopted children. Complaint, paras. 30-31; Petition for Writ of Certiorari, pp. 60a-61a. These events were further the result of the State's determination not to provide post adoptive services "minimally adequate" for the care and treatment of the children, or to provide the children with services comparable to those received by children in foster care or other State custody.

Petitioners filed their cause of action under 42 U.S.C. § 1983 alleging violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. As a remedy for these alleged injuries to themselves and others similarly situated, petitioners sought an order requiring the Commissioner to disclose the full content of agency files[3] and an order requiring the Commissioner to provide services minimally adequate for the children's care and treatment in order to raise the children to the level that they would have attained but for the Commissioner's program, and to equalize the treatment of special needs children in adoptive placements with those children who remain in the State's conservatorship. Complaint, prayer for relief, paras. a-c; Petition for Writ of Certiorari, pp. 65a-66a.

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[3] This issue is now moot as a result of a 1989 Texas law which specifically sets out adoptive parents' rights to receive copies of agency records. 2 Tex. Fam. Code Ann. § 16.0032 (Vernon Supp. 1990). Petition for Writ of Certiorari, p. 19a.

In response to the Commissioner's Motion to Dismiss, the District Court dismissed Petitioners' constitutional claims and entered judgment pursuant to Fed. Rule Civ. Proc. 54(b), concluding that there had been no violation of any constitutionally protected right. The Griffiths appealed the finding that Petitioners did not allege a constitutionally sufficient liberty or property interest abridged by the Commissioner. The Court of Appeals for the Fifth Circuit affirmed. The Court of Appeals held further that it had jurisdiction to consider only the appeal of one of the families to the litigation, the Griffiths, because only the Griffiths were identified as appealing in the Notice of Appeal from the District Court's judgment, relying on *Torres v. Oakland Scavenger*, 487 U.S. 312, 108 S.Ct. 2405, 101 L. Ed. 2d. 285 (1988). Fed. Rule App. Proc. 3(c).

REASONS FOR DENYING THE WRIT

ARGUMENT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE NEITHER THE PETITIONER PARENTS NOR THEIR ADOPTED CHILDREN HAVE IDENTIFIED IN THEIR COMPLAINT ANY INTERESTS IN LIBERTY OR PROPERTY THAT GIVE RISE TO THE PROTECTIONS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND SUCH AN EXPANSION OF THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE IS NOT WARRANTED.

At the threshold of any analysis of liability in an action under 42 U.S.C. § 1983 is whether the Plaintiffs have met their obligation to allege that they have a recognized interest in "liberty or property" within the purview of the Fourteenth Amendment and to "isolate the precise constitutional violation" in order to determine whether there has been a deprivation of that right. *Baker v.*

McCollan, 408 U.S. 564, 571, 92 S.Ct. 2701, 2706, 33 L. Ed 2d. 548 (1972). Any constitutional duty imposed upon a state official must relate to a constitutional right possessed by a citizen. If there is no constitutional right there can be no corresponding duty founded in the Fourteenth Amendment governing the conduct of a state official. Clearly then, not all "interests", whether founded in liberty or property, rise to the level of a due process right. *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L. Ed. 2d. 531 (1977).

Petitioners' failure to specifically identify any rights protected under the Fourteenth Amendment leads to the inescapable conclusion that they have failed to state a claim upon which relief can be granted. Their contentions are principally traditional tort causes of action for fraudulent misrepresentation and negligence. Liability under § 1983 is contingent upon deprivations of constitutionally protected rights, not violations of tort duties of care. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 77 L. Ed. 2d. 662 (1986). *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L. Ed. 2d. 677 (1986).

The interests in liberty or property giving rise to the Fourteenth Amendment's protections advanced by petitioners have at best been unclear.[4] During the course of the case the Petitioners have described these interests as "minimally adequate care and treatment" for the children; as interests "in receiving adequate information" by the parents;" as interests in "living in non-restrictive circumstances, in being autonomous, and in fulfilling each of their individual personalities" by the children. Despite Petitioners' attempt to retreat from an assertion of a fundamental right to post adoptive services, any fair reading of their complaint results in the conclusion that

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[4] The court below observed that Petitioners "have hindered our review by repeatedly recharacterizing the nature of asserted rights." Petition for Writ of Certiorari, p. 23a.

such services are precisely the right they seek to establish.[5]

After its analysis of the Petitioners' claims, the Court below correctly concluded that due process protection will attach to the Petitioners' asserted interests only if such interests are "fundamental" in the constitutional sense, or upon proof of deprivation of property interests established by state law. The Court went on to reject the parents' "fundamental right to adopt" and their "fundamental interest in informed decision making" pointing out the distinction between governmental interference and governmental assistance as a basis for due process relief. Petition Writ of Certiorari, Op. p. 29a citing *DeShaney v. Winnebago County DSS*, ____ U.S. ____, 109 S.Ct. 998, 1003, 103 L. Ed. 2d. 249 (1989).

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[5] Petitioners characterize the relief sought in the form of post adoptive services as a remedy for other constitutional injuries. While neither the district court nor the Fifth Circuit found it necessary to address the point, finding instead that no interests of a constitutional nature were present; such a remedy is precluded by the application of the Eleventh Amendment. Petitioners do not seek prospective injunctive relief against the Commissioner in his official capacity; rather they seek payment for themselves and the class they represent for post adoptive services to raise the children to the level that they would have attained but for the Commissioner's policies. These services include residential treatment and therapeutic counseling, servies which are not required by law nor provided to children subsequent to adoption. Since these services would of necessity be paid for with state funds, such a payment is tantamount to the payment of damages from the state treasury, a result clearly prohibited by the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L. Ed. 2d. 662 (1974).

Moreover, such a damage award against the Commissioner in his indivudal capacity is likewise precluded by the application of qualified immunity. Since any right that the Commissioner is alleged to have voilated was not clearly established at the time of his alleged conduct, the Commissioner is entitled to dismissal of Petitioners' claims against him in his individual capacity. *Anderson v. Creighton*, 483 U.S. 635, 638-640, 107 S.Ct. 3034 (1987).

In rejecting the children's asserted liberty interests in "the uninhibited development of their personalities" and their "interest in living in non-restrictive circumstances" the court below observed that the children's asserted personality interests "are beyond anything even remotely suggested in other substantive due process cases and indeed, would require a breathtaking extension of that doctrine." The Court similarly rejected Petitioners' asserted right to live in unrestricted circumstances and their reliance on *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L. Ed. 2d. 28 (1982), describing *Youngberg* and other "special relationship" cases as "completely inapposite". Petition for Writ of Certiorari, Op. p. 32a, citing *DeShaney*, 109 S.Ct. at 10056. The court below likewise correctly rejected Petitioners' "property interest" theories holding that Petitioners had not demonstrated an entitlement to any services or training under state law giving rise to an interest in property. Petition for Writ of Certiorari, Op. p. 35a. Finally, the court rejected Petitioners' Equal Protection claim holding that children who are in state conservatorship and children who are in final adoptive placements "are in no way similarly situated with regard to the medical and psychological services provided by the state," observing "the state's responsibility terminates when the state court finalizes the adoption, and the adoptive parents assume all rights and responsibilities over the child, including the support responsibilities previously placed on the state." Op. p. 38a, Petition for Writ of Certiorari, citing 2 Tex. Fam. Code Ann. § 12.04, 16.09(a) (Vernon 1986 and Vernon Supp. 1990).

These findings are all consistent with well established principals articulated by the Supreme Court. The Due Process clause of the Fourteenth Amendment was intended to proscribe "abuses" of governmental power or the arbitrary exercise of that power which resulted in "grievous losses" to the individual citizen. Not every grievous loss, however, suggests a constitutional concern. *Kentucky Dep't of Corrections v. Thompson*, ___ U.S. _____, 109 S.Ct.

1904, 1909, 104 L. Ed. 2d. 506 (1989). *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L. Ed. 2d. 484 (1972).

When the Supreme Court is requested, as here, to expand the substantive component of the due process clause by the creation of a new substantive right, it must proceed with great caution. Virtually all of the cases involving this notion have contained such a warning. Courts must resist the temptation to augment the substantive reach of the Fourteenth Amendment, "particularly if it requires redefining the category of rights deemed to be fundamental." Petition for Writ of Certiorari, Op p. 21-22a, citing *Michael H. v. Gerald D.*, ____ U.S. _____, 109 S.Ct. 2333 at 2341, 105 L. Ed. 2d 91 (1989), *Bowers v. Hardwick*, 478 U.S. 186 at 194-95, 106 S.Ct. 2841, 2844 92 L. Ed. 2d. 140 (1986). In *Moore v. City of East Cleveland*, the court observed:

> "There are risks when the judicial branch gives enhanced protection to certain substantive liberties without guidance of the more specific provisions of the Bill of Rights. . . .Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from care, 'respect for the teachings of history (and) solid recognition of the basic values that underlie our society.' *Id.*, at 97 S.Ct. p. 1937 citing *Griswold v. Connecticut*, 381 U.S. at 501, 85 S.Ct. at 1691.

This case represents a request for this court to expand substantially the substantive component of the Fourteenth Amendment's due process rights. The ultimate result of such an interpretation, as the Court below recognized, is to create a duty in a state official to be an insurer of children placed by him for adoption. Petition for Writ of Certiorari, Op. p.30a, p. 36a. Such a result is untenable and certiorari should be denied.

II. THERE IS NO ONGOING "SPECIAL RELATIONSHIP" BETWEEN A STATE OFFICIAL AND A CHILD WHO WAS ONCE IN STATE CONSERVATORSHIP BUT WHO IS NOW IN A PERMANENT ADOPTIVE HOME.

In their Petition for Writ of Certiorari, Petitioners suggest that there is, after *DeShaney*, a conflict in the circuit courts of appeals as to whether "custody" is a prerequisite to a due process duty in a state official. Respondent does not believe that such a conflict is present but, that aside, the real question is under what circumstances does a "special relationship" exist between an individual and a state official so as to create a constitutional duty of care. What Petitioner characterizes as a conflict in the Circuit Court of Appeals opinions subsequent to *DeShaney* is in reality an argument for the extension of the "special relationship" between the individual and the state official in such a way as to recognize an "ongoing special relationship" if the individual has ever been in the state's care. This represents an enormous extension of the constitutional duty imposed in the "special relationship" cases and is a result specifically rejected in *DeShaney*.

The Supreme Court has recognized that in limited circumstances the Constitution has required state officials to act in conformance with certain affirmative duties of care for protection of particular individuals. *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L. Ed. 2d 251 (1976), *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L. Ed. 2d 28 (1982). But as the Court in *DeShaney* explained "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *DeShaney*, 109 S.Ct. at 1006.

The cases cited in support of their conflict argument are distinguishable both from this case and from *DeShaney*.

The Court of Appeals for the Sixth Circuit specifically held that *DeShaney* does not apply in a case in which a child is in the conservatorship of the state and is in foster care. *Meador v. Cabinet for Human Services*, 902 F.2d 474 at p. 476 (6th Cir. 1990). Likewise in *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), a case decided prior to *DeShaney*, the court held that a child who is placed in foster care after the state has assumed responsibility for the child's custody, supervision and care, has a special relationship with the state so as to give rise to a duty of care. Whether there is a "special relationship" in a foster care setting is an issue that was specially reserved by the *DeShaney* Court as to whether a foster home setting is a "situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect," *DeShaney* 109 S.Ct. at 1006 n. 9.

Both *Meador* and *Taylor* are distinguishable from this case. The Court below recognized a "special relationship" with the children when the state assumed responsibility for their care after removal from their natural homes. The court however, rejected the notion of an "ongoing special relationship" requiring the State to extend services after the children were placed in permanent adoptive homes and after their adoptive parents had assumed the same rights and duties toward the children as natural parents, relying upon this Court's holding in *DeShaney* that the State terminated any "special relationship" it had when it returned Joshua to his parents. As the Supreme Court reasoned, "The State does not become the permanent guarantor of an individual's safety having once offered him shelter. *Id.*, at 1006. Likewise, the Court below held "that TDHS once acted as guardian for the children does not oblige the State to provide continual services to those children placed in permanent homes." Petition for Writ of Certiorari, Op. p. 33a-34a

Since a state official's constitutional duty of care is dependant upon the existence of this "special relationship" (assuming the existence of a constitutionally protected

right), and since the application of the *DeShaney* analysis to the facts of this case demonstrates the absence of a special relationship, the Supreme Court should deny Petitioners' Writ of Certoirari.

III. THE COURT OF APPEALS WAS WITHOUT JURISDICTION TO CONSIDER THE APPEALS OF PARTIES OTHER THAN THOSE NAMED IN THE NOTICE OF APPEAL.

This suit was filed originally by eighteen adopted children and twelve adoptive parents. Subsequent to the district court dismissal of their constitutional claims, a notice of appeal was filed styled "Susan and Reggie Grifith, et.al.", omitting the names of the other original Plaintiffs from the filing. The Court below found that it lacked jurisdiction to consider the appeal of any original Plaintiffs who were not named specifically in the notice of appeal, relying on this Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L. Ed. 2d. 285 (1988).

In *Torres* this Court specifically found that the use of the phrase "*et al.*" was insufficient to provide the required notice of appeal to the opposing parties or to the Court. *Id.* at 108 S.Ct. p. 2409. The Court found further that the notice requirement of Fed. Rule App. Proc. 3(c) was a jurisdictional prerequisite to appeal. Consequently, the Circuit Court acted *sua sponte* to consider this jurisdictional issue and determined that all Plaintiffs to the original action except the Griffiths and their children had filed a defective notice of appeal. The court did permit the Griffith children to appeal because Susan and Reggie Griffith had originally sued in both their individual and representative capacities. *King v. Otasco*, Inc., 861 F.2d 438 (5th Cir. 1988).

As Petitioners acknowledge, this decision is in accord with decisions of four other Circuit Courts, (Petition for Writ of Certiorari p. 16) however, they suggest a conflict

with the decisions of the Second and the Ninth Circuits. The cases cited by the Petitioners are distinguishable from this case. In *Baylis v. Marriott Corp.*, 906 F.2d 874 (2nd Cir. 1990) the Court held that "we may consider a technical defect to be immaterial if the notice of appeal contains the 'functional equivalent' of listing each appealing parties' name," *Id.*, at p. 877, citing *Torres* at 108 S.Ct. at 2409. The Court went on to acknowledge that the mere appendage of the phrase *et al.* was not sufficient. The *Baylis* Court determined that since the body of the Notice of Appeal stated that the appeal was being taken by "all of the Plaintiffs in this action," any ambiguity created by the use of *et al.* was resolved. In *National Center for Immigrants Rights v. INS*, 892 F.2d 814 (9th Cir. 1989) the Ninth Circuit in a *per curiam* opinion held that the use of the all inclusive term "Defendants" in the body of the Notice of Appeal was sufficient to perfect the appeal for all of the Defendants. That case is distinguishable from *Torres* and this case in that there was no ambiguity present attributable to the use of the term *et al.* The holding *Torres* is well reasoned and clear, accordingly Petitioners' Writ of Certiorari on this issue should be denied.

CONCLUSION

Respondent respectfully request that this Court deny Petitioners' Writ of Certiorari to the Court of Appeals for the Fifth Circuit and affirm the judgment of that Court in this case.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the 26th day of November, 1990, to:

Neil Cogan
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JAMES C. TODD, Chief
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